EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-1918

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

No. _____

==========

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO, Petitioner,

v.

KEVIN DEMUTH, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH DISTRICT COURT OF APPEALS OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. BAXTER
406 Columbus Ave.
Sandusky, Ohio 44870
(419) 627-7697
Counsel for Petitioner

QUESTION PRESENTED

1. Does the Fifth Amendment of the United States Constitution and Art. I § 10 of the Ohio Constitution bar the retrial of a defendant on the offense of involuntary manslaughter when allied offenses of similar import tried to a jury resulted in a hung jury on the offense of involuntary manslaughter and not guilty on the offense of aggravated vehicular homicide.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, The State of Ohio, represented by the Honorable Kevin J. Baxter, Prosecutor for Erie County and James W. Hart, attorney for respondent. Alan C. Travis was an appellant in the court below, as counsel on behalf of the Ohio Prosecuting Attorneys Association, Amicus Curiae.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW. 2

JURISDICTION 3

STATUTE INVOLVED 4

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 12

THE SIXTH DISTRICT COURT OF APPEALS OF THE STATE OF OHIO INCORRECTLY APPLIED THE DOUBLE JEOPARDY PRINCIPLES ENUNCIATED IN GRADY V. CORBIN, 495 U.S. , 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), TO A RETRIAL OF AN OFFENSE FOR WHICH THE JURY WAS HUNG

CONCLUSION 24

APPENDIX:

State of Ohio v. Demuth, unreported, Case No. E-90-51 (Sixth App. Dirst., Erie Cty., November 1, 1992) A-1

Ohio Supreme Court decision A-11

U. S. Const. amend. V A-12

O Const. art. I § 10 . . . . . A-13

Ohio Revised Code Ann. §2903.04 (Baldwin's 1986 & supp. 1990). . . . A-15

Ohio Revised Code Ann. §2903.06 (Baldwin's 1986 & Supp 1990). A-16

TABLE OF AUTHORITIES

Cases: Page

Blockburger v. United States, 284 U.S. 299 (1932). 15,18

Grady v. Corbin, 495 U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) 2,12,13,15,16,17,18,19,20

North Carolina v. Pearce, 395 U. S. 711 (1969). 14

Richardson v. United States, 468 U.S. 317 (1984). 14,15,19,20,23

State v. Chippendale, 52 Ohio St. 3d 118 (1990). 15,16,17,22,23

State of Ohio v. Demuth, unreported, Case No. E-90-51 (Sixth App. Dist., Erie Cty., November 1, 1991). . . . 2,16

Constitution:

U.S. Const. amend. V. . . . . .passim

Ohio Const. art. I, § 10. . . . . .passim

Statutes:

Ohio Revised Code Ann. §2903.04 (Baldwin's 1986 & Supp. 1990). . . .5,9,21

Ohio Revised Code Ann. §2903.06 (Baldwin's 1986 & Supp. 1990). . . .6,9,21

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO, Petitioner,

v.

KEVIN DEMUTH, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH DISTRICT COURT OF APPEALS OF THE STATE OF OHIO

The petitioner, the State of Ohio, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Sixth District Court of Appeals of the State of Ohio, entered in the above-entitled proceeding on November 1, 1991, wherefore, the Ohio Supreme Court dismissed, sua sponte, petitioner's motion for leave to appeal from the Court of Appeals on March 4, 1992.

OPINIONS BELOW

The opinion of the Sixth District Court of Appeals for the State of Ohio is unreported in State of Ohio v. Demuth, unreported, Case No. E-90-51 (Sixth App. Dist., Erie Cty., November 1, 1991), and is reprinted in the appendix hereto, A-1, infra.

The dismissal sua sponte for petitioner's motion for leave to appeal to the Supreme Count of Ohio has not been reported. It is reprinted in the appendix hereto, A-11, infra.

JURISDICTION

At trial in the Court of Common Pleas of Erie County, Ohio, respondent was found not guilty of the offense of Aggravated Vehicular Homicide but the jury could not reach a verdict as to the offense of Involuntary Manslaughter

A retrial was scheduled for the offense of Involuntary Manslaughter. Upon respondent's motion, the indictment was dismissed because a re-trial would place respondent twice in jeopardy.

Upon appeal by the petitioner, the Sixth District Court of Appeals for Erie County, Ohio, affirmed the judgment of the trial court based on Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084, 109 L. Ed. 2d 548. Subsequently, the Ohio Supreme Court denied petitioner's leave to appeal on March 4, 1992

The jurisdiction of this Court to review the judgement of the Sixth District

Court of Appeals for Erie County, Ohio is invoked under 28 U.S.C. §1257(3).

STATUTE INVOLVED

U.S. Const. amend. V, Double Jeopardy Clause

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

O Const I § 10 Rights of criminal defendants

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation

against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Ohio Rev. Code Ann. §2903.04 Involuntary

Manslaughter

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is an aggravated felony of the first degree.

Violation of division (B) of this section is an aggravated felony of the third degree.

Ohio Rev. Code Ann. §2903.06 Aggravated

Vehicular Homicide

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.
(B) Whoever violates this section is guilty of aggravated vehicular homicide, an aggravated felony of the third degree. If the offender previously has been convicted of or pleaded guilty to an offense under this section or section 2903.07 or 2903.08 of the Revised Code, aggravated vehicular homicide is an aggravated felony of the second degree.

If jury or judge as trier of fact finds that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, at the time of the commission of the offense, then the offender's driver's or commercial driver's license or permit or nonresident operating privilege shall be permanently revoked pursuant to section 4507.16 of the Revised Code.

When the trier of fact determines whether the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test taken pursuant to section 1547.111 [1547.11.1] or 4511.191 [4511.19.1] of the Revised Code may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for the chemical test a

concentration of ten-hundredths of one per cent or more by weight of alcohol in the offender's blood, ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

(C) If the offender previously has been convicted of or pleaded guilty to a violation of this section or section 1547.11, 2903.07, 2903.08, 4511.19, or 4511.192 [4511.19.2], or division (B) or (D) of section 4507.02 of the Revised Code, a violation of 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, a violation of a municipal ordinance that is substantially similar to section 2903.07, 2903.08, 4511.19, or 4511.192 [4511.19.2] of the Revised code, or a violation of a municipal ordinance that is substantially similar to section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, if the offender has accumulated twelve points pursuant to section 4507.021 [4507.02.1] of the Revised Code within one year of the offense, or if in the commission of the offense the offender was driving under suspension or operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, he shall not be eligible for shock probation, probation, or shock parole pursuant to section 2947.061 [2947.06.1] or 2951,02, or 2967.31 of the Revised Code.

STATEMENT OF THE CASE

During the early morning hours of August 5, 1989, respondent, while operating a motor vehicle, failed to negotiate a turn, left the side of the road, and collided, head-on, with a tree. (TR 51, 63-64) At the time of the collision. the weather was dry with a light ground mist. (TR 52, 75) Respondent, who was familiar with the curving road, did not attempt to break, swerve or take other action to prevent collision. (TR 63-64, 131) As a result of the collision, respondent's passenger, Michael Graves, was killed. (TR 379).

Respondent was transported to Providence Hospital. Blood was drawn from respondent at 5:34 a.m. (TR 78, 82-83). Respondent's blood alcohol level was determined to be 0.12 (TR 153).

On January 17, 1990, respondent, Kevin DeMuth, was indicted by the Erie

County Grand Jury for the offenses of Aggravated Vehicular Homicide in violation of Ohio Revised Code Ann. §2903.06 (Baldwin's 1986 & Supp. 1990) (hereinafter "R.C."), and for the offense of Involuntary Manslaughter in violation of R.C. §2903.04(B).

Trial commenced on April 2, 1990. At trial, Trooper Robert Gochoel, a forensic scientist, testified that respondent's blood alcohol level, at the time of the collision, would have been greater than 0.12 (TR 161). Trooper David Cope, Trooper Richard Schupe, Huron Police Officer Gregory Bodkin, and Gerard Christopher Davis, all testified that respondent exhibited a number of symptoms of inebriation indicating respondent was under the influence of alcohol prior to the fatal collision, at the time of the collision, and two hours after the collision. (TR 63, 203, 241, 272)

Further, respondent admitted to driving under the influence of alcohol on prior occasions, although he had never been convicted of a D.U.I. offense. (TR 373, 382) Respondent, testified that, in his opinion, the fatal collision was not the result of driving under the influence of alcohol but was the result of his falling asleep while driving. (TR 361, 364) Respondent made the unsupported claim that he had only four ounces of alcohol in a four-hour time period. (TR 366)

In contrast, Trooper Gochoel testified that based on respondent's body weight, respondent would have had to consume more than five beers in order for his blood alcohol level to be 0.12%. (TR 156) Moreover, Gerard Christopher Davis testified that the victim and respondent had been drinking since 7:00 p.m. (TR 266) Gerard Davis further testified that he observed respondent four to six times that

evening, and respondent always had a beer in his hand. In addition, Davis said respondent was acting in an inebriated fashion. (TR 268, 272)

On April 9, 1990, the jury found respondent "not guilty" of Aggravated Vehicular Homicide, however, the jury was unable to reach a verdict on the offense of Involuntary Manslaughter. The court ordered the jurors discharged and rescheduled respondent for trial on May 22, 1990.

On May 7, 1990, respondent filed a motion to dismiss the indictment for the offense of Involuntary Manslaughter alleging a retrial would violate the Double Jeopardy Clause of the Constitutions of the United States and the State of Ohio. On September 10, 1990, this motion was granted.

The judgment of the trial court was affirmed on November 1, 1991, in the Court

of Appeals of Erie County, Sixth Judicial District (App. A-1). The Court of Appeals, based on their interpretation of Grady v. Corbin, 495 U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), held that a retrial for the offense of Involuntary Manslaughter is barred by the Double Jeopardy Clause. The court stated at P. 4 of their opinion, (App. A-7) that:

> [A]ppellee was acquitted of recklessly causing the death of another while operating an automobile. Because the reckless operation of an automobile constitutes a misdemeanor offense, we conclude that the double jeopardy clause bars a further prosecution of appellee for involuntary manslaughter, that is recklessly causing the death of another as a proximate result of committing a misdemeanor offense.

The State of Ohio timely sought appeal in the Supreme Court of Ohio. The Ohio Prosecuting Attorneys Association filed a brief amicus curiae. The Ohio Supreme Court dismissed the appeal sua

sponte for the reason that no substantial constitutional question exists therein.

REASONS FOR GRANTING THE WRIT

THE SIXTH DISTRICT COURT OF APPEALS OF THE STATE OF OHIO INCORRECTLY APPLIED THE DOUBLE JEOPARDY PRINCIPLES ENUNCIATED IN GRADY V. CORBIN, 495 U.S. , 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), TO A RETRIAL OF AN OFFENSE FOR WHICH THE JURY WAS HUNG

A subsequent trial for the offense of Involuntary Manslaughter after a hung jury does not violate the Fifth Amendment of the United States Constitution. The Fifth Amendment, as well as the Ohio Const. art. I, § 10, provides that no person shall be subject for the same offense to be twice put in jeopardy. Based on case law interpretations the Double Jeopardy Clause, only, provides three protections: (1) protection against a second prosecution for the same offense following acquittal, (2) protection against a second

prosecution following conviction, and (3) protection against multiple punishment for the same offense. North Carolina v. Pearce, 395 U. S. 711 (1969). In lieu of these protections, the United States Supreme Court, in Richardson v. United States, 468 U.S. 317 (1984), Syllabus, held that:

> 1a, 1b. Where the jury trying a defendant acquits him on one of several counts but is unable to agree as to the others, and the trial court declares a mistrial to these counts, and sets them for retrial, the defendant has no valid double jeopardy clause to prevent his retrial, there having been no termination of the original jeopardy.
>
> 3a, 3b. The protection of the double jeopardy clause of the Fifth Amendment by its terms applies only if there has been some event, such as acquittal, which terminates the original jeopardy; a jury's failure to reach a verdict or a trial court's declaration of a mistrial following a hung jury is not an event which terminates the original jeopardy.

In the case at bar, the jury was unable to reach a verdict as to the charge

of Involuntary Manslaughter. Consequently, under the holding of Richardson, original jeopardy did not terminate and no valid double jeopardy claim existed to prevent a retrial on the offense of Involuntary Manslaughter.

The trial court as well as the Sixth District Court of Appeals chose to disregard the case of Richardson and relied on State v. Chippendale, 52 Ohio St. 3d 118 (1990), and Grady v. Corbin, 495 U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). The Court of Appeals stated that:

> Traditionally, courts have relied on the test set forth in Blockburger v. United States to determine whether a subsequent prosecution is barred. (1932) 284 U.S. 299. The test is as follows:
>
> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Paragraph three of the syllabus.

State v. Demuth Unreported, Case No. E-90-51 (Sixth App. Dist., Erie Cty., Nov. 1, 1991), 2-3. The Court of Appeals further pointed out that the test is a rule of statutory construction and is only a guide to determine whether the legislature intended multiple punishments. The court then proceeded to rely on Grady in affirming the decision of the trial court.

In the case of Chippendale, supra, defendant was convicted of both Involuntary Manslaughter and Vehicular Homicide. The court held that defendant could be charged on both offenses but only sentenced on one. Chippendale, 52 Ohio St. 3d at 122. No hung jury existed under the facts of Chippendale, and therefore, the issue of double jeopardy did not arise. Under Chippendale, respondent, in the case at bar, was properly indicted for the offenses of Involuntary Manslaughter and

Aggravated Vehicular Homicide. It would have been at the sentencing stage that the holding of Chippendale would have been dispositive. However, the case did not reach the sentencing stage due to the fact that the jury was hung on the offense of Involuntary Manslaughter.

The same circumstance is present in the case of Grady. Although involving essentially the same offenses as the instant case, the Court in Grady did not address the ultimate issue before this Court. In Grady, defendant pled guilty in the LaGrange Town Justice Court to Driving While Intoxicated and Failing to Keep Right of the Median. Two months after defendant entered guilty pleas to the traffic offenses, a Grand Jury indicted defendant for the offenses of Reckless Manslaughter, second degree Vehicular Manslaughter, Criminally Negligent Homicide, third degree Reckless Assault

and Driving While Intoxicated. The State provided a Bill of Particulars indicating it intended to use defendant's conduct of driving while intoxicated and failing to keep right of median as the basis for establishing essential elements of the homicide and assault offenses.

Based on this particular set of circumstances, this Court, in Grady, imposed a two step process in determining when a retrial would be barred. Initially, the traditional Blockburger test[1] must be applied. Grady, 495 U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d at 556. However, the Court went further and held that the Double Jeopardy Clause bars a subsequent prosecution if the prosecutor

---

[1] "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses, or only one, is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States (1932), 284 U.S. 299 (paragraph 3 of Syllabus).

will use conduct which constitutes an offense for which defendant had been prosecuted in order to establish an essential element of the offense charged. Id. at 551, Syllabus 1a-1f. Grady never addressed the issue of a hung jury and in no way overruled any aspect of Richardson.

Based on the holding in Grady, a retrial for the offense of Involuntary Manslaughter, in the case at bar, would not be barred by the double jeopardy provision. In Grady, defendant entered pleas of guilty to what can be termed as lesser included offenses before being indicted for offenses of a higher degree. In contrast, in the case at bar, respondent was indicted for both Involuntary Manslaughter and Aggravated Vehicular Homicide under one indictment. Since the jury was hung as to the offense of Involuntary Manslaughter original jeopardy was not terminated. In contrast,

the proceeding was continuing with a re-trial of the offense. Therefore, there is no subsequent prosecution but a continuing prosecution in which jeopardy has not terminated under the case of Richardson. Consequently, the Ohio Supreme Court, by denying petitioner's leave to appeal, and the Sixth District Court of Appeals for the State of Ohio, by ignoring the holding in Richardson, have created a conflict between the holdings of the case of Richardson and the case of Grady. This conflict should be reviewed by this Court.

The offenses of Involuntary Manslaughter and Aggravated Vehicular Homicide do not further constitute the same offense pursuant to the Blockburger test. Involuntary Manslaughter provides that:

> §2903.04 Involuntary Manslaughter.
> ***
> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.
> ***

Whereas, the offense of Aggravated Vehicular Homicide provides that:

> §2903.06 Aggravated Vehicular Homicide.
> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.
> ***

The literal reading of the statutes demonstrates that the conduct the prosecution is required to prove for Involuntary Manslaughter does not require the same proof as the offense of Aggravated Vehicular Homicide. In order to convict a defendant of Involuntary Manslaughter, the prosecution is only required to prove that defendant caused the death of another while engaged in a

misdemeanor offense. However, in order to convict a defendant of Aggravated Vehicular Homicide, the prosecution is required to prove that defendant, while operating a motor vehicle, recklessly caused the death of another. In the case at bar, It would appear that the jury, based on the verdict, determined respondent was not reckless but could not reach a decision as to whether respondent committed or attempted to commit a misdemeanor offense which was the proximate cause of death of Michael Graves. Thus, although Involuntary Manslaughter and Aggravated Vehicular Homicide are allied offenses for sentencing purposes pursuant to Chippendale, supra, they do not constitute the same offense in the case of a hung jury. Thus, the Court of Appeals erroneously affirmed the trial court's dismissal of the Involuntary Manslaughter

count and ignored the specific holding in Richardson. The Double Jeopardy Clause permits a retrial following a hung jury because jeopardy is not terminated with the hung jury.

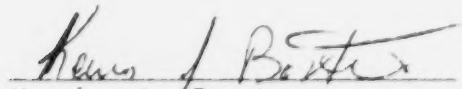
Finally, Appellant urges the United States Supreme Court to grant petitioner's writ in that the question raised herein is one of great general interest. As was evidenced in Chippendale, supra, it is common practice for Prosecuting Attorneys across the State of Ohio, as is probable in other jurisdictions, to indict defendants with both Aggravated Vehicular Homicide and Involuntary Manslaughter where a death resulted in the drunk driving of an automobile. By ignoring the case of Richardson, the State of Ohio has set a erroneous precedence for the jurisdictions which is contrary to the Double Jeopardy Provision. As a result,

the Supreme Court should address the question presented in this appeal.

CONCLUSION

Due to the conflict of the interpretation of the Double Jeopardy Clause, we respectfully move that this petition for certiorari be granted.

Respectfully submitted,



Kevin J. Baxter
406 Columbus Ave.
Sandusky, Ohio 44870

APPENDIX

IN THE COURT OF APPEALS OF ERIE COUNTY

State of Ohio : C.A. Case No. E-90-51

Appellant : C.P. No. 89-CR-359

v. :

Kevin L. DeMuth : DECISION AND JOURNAL ENTRY

Appellee : Decided: November 1, 1991

---oOo---

Kevin J. Baxter, Erie County Prosecutor, for appellant.

James W. Hart, for appellee.

---oOo---

This matter is before the court on appeal from the Erie County Court of Common Pleas. The facts giving rise to this appeal are as follows.

In the early morning hours of August 5, 1989, appellee, Kevin DeMuth, was driving on Jeffries Road in Erie County when he failed to negotiate a turn and hit a tree. His passenger, Michael Graves, was killed in the accident. Appellee was transported to a hospital where blood tests were taken which revealed a blood alcohol content of .12.

On January 17, 1990, appellee was indicted on one count of aggravated vehicular homicide, a violation of O.C. 2903.06, and one count of involuntary manslaughter, a violation of R.C. 2903.04(B).

Trial commenced on April 2, 1990. On April 9, 1990, a jury found appellee not guilty of aggravated vehicular homicide. The jury was unable to reach a verdict on the charge of involuntary manslaughter. The court ordered the jurors discharged and rescheduled appellee for trial on May 22, 1990. On May 7, 1990, appellee filed a motion to dismiss the indictment for involuntary manslaughter. Appellee argued that a retrial would impermissibly violate his constitutional right against double jeopardy. On September 10, 1990, the court granted appellant's motion. It is from this decision that the state appeals setting forth the following assignments of error:

"ASSIGNMENT OF ERROR NO. 1: THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION TEN OF THE OHIO CONSTITUTION DO NOT BAR THE RETRIAL OF A DEFENDANT WHEN AN OFFENSE PREVIOUSLY TRIED TO A JURY RESULTED IN THE JURY'S INABILITY TO REACH A VERDICT THEREBY RESULTING IN A HUNG JURY.

"ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ABUSED ITS DISCRETION TO THE SUBSTANTIAL PREJUDICE OF THE STATE OF OHIO BY RULING ITEMS OF CRITICAL EVIDENCE TO BE INADMISSIBLE.

"A. THE TRIAL COURT ABUSED ITS DISCRETION TO THE SUBSTANTIAL PREJUDICE OF THE STATE OF OHIO BY RULING THAT THE EXPERT TESTIMONY OF DR. ROBERT FORNEY, PhD, WAS INADMISSIBLE.

"B. THE TRIAL COURT ABUSED ITS DISCRETION TO THE SUBSTANTIAL PREJUDICE OF THE STATE OF OHIO BY RULING TESTIMONY OF LAY WITNESSES AS TO DEFENDANT'S SOBRIETY TO BE INADMISSIBLE."

The Fifth Amendment to the United States Constitution precludes a criminal defendant from being placed in Jeopardy on previous criminal charges. The double jeopardy clause is enforceable against the states through the Fourteenth Amendment. Benton v. Maryland (1969), 395 U.S. 784. The clause

protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction and/or multiple punishments for the same offense. North Carolina v. Pearce (1969), 395 U.S. 711, 717. Traditionally, courts have relied on the test set forth in Blockburger v. United States to determine whether a subsequent prosecution is barred. (1932) 284 U.S. 299. The test is as follows:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Paragraph three of the syllabus.

The Blockburger test is limited in that it is a rule of statutory construction and a guide to determine whether the legislature intended multiple punishments. Grady v. Corbin (1990), 100 S. Ct. 2084, 2091, citing Missouri v. Hunter (1983), 459 U.S. 359, 366.

Therefore, "a subsequent prosecution must do more than merely survive the Blockburger test." Grady, supra, at 2093. The Grady case also involved an alcohol related traffic fatality. In Grady, the defendant pled guilty to driving while intoxicated and was later indicted on, among other things, reckless manslaughter and criminally negligent homicide. Because the state admitted in its bill of particulars that it would rely on the defendant's conviction for drunk driving to establish the defendant's recklessness or negligence, the U.S. Supreme Court found that the double jeopardy clause barred the prosecution. Justice Brennan in writing for the court held:

> "[T]he double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."***
>
> "The critical injury is what conduct the state will prove, not the

> evidence the state will use to prove that conduct." Id.

As discussed above, appellee was indicted on and found not guilty by a jury of one count of aggravated vehicular homicide. R.C. 2903.06, aggravated vehicular homicide, provides as follows:

> "No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another." (Emphasis added.)

The jury was unable to reach a verdict on count two of the indictment which reads as follows:

> "***[O]n or about the 5th day of August, 1989, in Erie County, Ohio, Kevin DeMuth did recklessly cause the death of Michael R. Graves as a proximate result of his committing a misdemeanor to wit: ORC 4511.19, Driving Under the Influence, all in violation of Ohio Revised Code, Section 2903.04(B)***."

R.C. 2903.04(B), involuntary manslaughter, provides as follows:

> "No person shall cause the death of another as a proximate result of the

> offender's committing or attempting to commit a misdemeanor."

In State v. Davis (1983), 23 Ohio App. 3d 265, the Second District Court of Appeals stated:

> "[a]ggravated vehicular homicide, requires the reckless operation of a motor vehicle resulting in the death of another. Consequently, the defendant must be recklessly operating his vehicle, which is of itself a misdemeanor. Thus, a violation of R.C. 2903.06 [aggravated vehicular homicide] will of necessity result in the violation of R.C. 2903.04(B), involuntary manslaughter." Id., at 270.

The Supreme Court of Ohio agreed with this analysis in State v. Chippendale (1990) 52 Ohio St. 3d 188, 121.

In the present case, appellee was acquitted of recklessly causing the death of another while operating an automobile. Because the reckless operation of an automobile constitutes a misdemeanor offense, we conclude that the double jeopardy clause bars a further prosecution of appellee for involuntary manslaughter,

that is, recklessly causing the death of another as proximate result of committing a misdemeanor offense. Accordingly, appellant's first assignment of error is found not well-taken.

In its second assignment of error, the state contends that the court abused its discretion in failing to admit the testimony of Dr. Robert Forney, a forensic toxicologist. The state also contends that the court bused its discretion in failing to admit the testimony of certain lay witnesses.

It is well-settled that the trial court is entitled to broad discretion in its evidentiary rulings. State v. Maurer (1984), 15 Ohio St. 3d 239, 265 citing State v. Hymore (1967), 9 Ohio St. 2d 122, 128; State v. Williams (1982), 7 Ohio App. 3d 160.

The court refused admission of Forney's testimony on the basis of Loc. R. 15.01 (B)

of the Erie County Court of Common Pleas Rules of Practice. The rule provides the "[N]o medical or other expert witness will be permitted to testify either by deposition of at trial unless two (2) weeks prior to the expert's testimony a written or audiotape report relative to the expert's prospective testimony is served to opposing counsel." The state contends that Loc. R. 15.01(B) is limited to civil actions. However, we find no such limiting language in the local rules.

As to the testimony of the state's lay witnesses, we note that the court admitted the testimony of experienced highway patrolman David Cope, the first officer at the scene of the accident. Cope testified to his well trained observations that appellee was intoxicated. Moreover, the court admitted appellee's blood alcohol test reading of .12 into evidence. Although testimony from lay witnesses regarding a

defendant's state of intoxication is generally admissible, we cannot say it was prejudicial for the court in this case to preclude the testimony of the other lay witnesses regarding appellee's intoxication given the fact that other evidence regarding appellant's state of intoxication was before the court. Accordingly, the court did not abuse its discretion in failing to admit the testimony of Forney and the other lay witnesses, and appellant's second assignment of error is found not well-taken.

On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Erie County Court of Common Pleas is affirmed. Costs to appellant.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

George M. Glasser, J. _____ JUDGE

Charles D. Abood, J. _____ JUDGE

Melvin T. Resnick, J. _____ JUDGE

THE SUPREME COURT OF OHIO

1992 TERM

To wit: March 4, 1992

State of Ohio :
Appellant, Case No. 91-2543

v. : E N T R Y

Kevin DeMuth, :
Appellee.

Upon Consideration of the motion for leave to appeal from the Court of Appeals for Erie County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional questions exists therein.

COSTS:

Motion Fee, $40.00, paid by Kevin J. Baxter.

(Court of Appeals No. E9051)

THOMAS J. MOYER
Chief Justice

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

O Const I § 10 Rights of criminal defendants

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance

of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

O.R.C. Sec. 2903.04 Involuntary manslaughter.

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is an aggravated felony of the first degree. Violation of division (B) of this section is an aggravated felony of the third degree.

§ 2903.06 Aggravated vehicular homicide.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, an aggravated felony of the third degree. If the offender previously has been convicted of or pleaded guilty to an offense under this section or section 2903.07 or 2903.08 of the Revised Code, aggravated vehicular homicide is an aggravated felony of the second degree.

If jury or judge as trier of fact finds that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, at the time of the commission of the offense, then the offender's driver's or commercial driver's license or permit or

nonresident operating privilege shall be permanently revoked pursuant to section 4507.16 of the Revised Code.

When the trier of fact determines whether the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test taken pursuant to section 1547.111 [1547.11.1] or 4511.191 [4511.19.1] of the Revised Code may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for the chemical test a concentration of ten-hundredths of one per cent or more by weight of alcohol in the offender's blood, ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or fourteen-hundredths of one gram or more by weight of

alcohol per one hundred milliliters of his urine.

(C) If the offender previously has been convicted of or pleaded guilty to a violation of this section or section 1547.11, 2903.07, 2903.08, 4511.19, or 4511.192 [4511.19.2], or division (B) or (D) of section 4507.02 of the Revised Code, a violation of 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, a violation of a municipal ordinance that is substantially similar to section 2903.07, 2903.08, 4511.19, or 4511.192 [4511.19.2] of the Revised code, or a violation of a municipal ordinance that is substantially similar to section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, if the offender has accumulated twelve points pursuant to section 4507.021 [4507.02.1] of the Revised Code within one year of the offense, or if

in the commission of the offense the offender was driving under suspension or operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, he shall not be eligible for shock probation, probation, or shock parole pursuant to section 2947.061 [2947.06.1] or 2951,02, or 2967.31 of the Revised Code.